(2)

No. 84-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, Administrator of Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, Northern California Regional Office, Veterans Administration,
Appellants,

vs.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS WILSON, an individual,
Appellees,

and AMERICAN G.I. FORUM, a national non-profit corporation,
Intervenor-Appellee.

Direct Appeal From the United States District Court For the Northern District of California

APPELLEES' MOTION TO AFFIRM

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Name	Position	Abbreviation
Hawke, Wesley	Member, N. Cal. Regional Office rating board	Haw.
Jacobsen, Thomas	Legal Specialist, N. Cal. Regional Office rating board	Jac.
Maxwell, Albert R.	SCDD recipient	Max.
Phillips, Dean K.	Attorney Advisor, BVA	Phil.
Polcari, Robert	Assistant to Max Woodall	Pol.
Standefer, Richard	Member, BVA	Stan.
Verrill, Thomas	Adjudication Officer N. Cal. Regional Office	Ver.
Woodall, Max	Director, V.A. Compensation and Pension Service	Wood.

II. DECLARATIONS OR AFFIDAVITS

Name	Description	Abbreviation
Atlee, Walter R.	SCDD recipient	Atlee
Autrey, Clarence W.	SCDD recipient	Aut.
Bakal, Ronald G.	Attorney	Bakal
Bahuss, Mary	Attorney	Bal.
Bianchi, James L.	Attorney	Bian.
Bitzer, Ronald M.	Claims Agent	Bit.
Blecker, Michael A.	Attorney (Swords to Plowshares)	Blek.
Burke, John	SCDD applicant	Burke
Caron, Martha L.	Attorney	Caron
Clapp, Delores	SCDD applicant (widow)	Clapp
Cordray, Don E.	SCDD recipient	Cor.
Dempsey, Lola	SCDD applicant (widow)	Demp.
De Nike, Howard J.	Attorney	DeN.
Deverment, Dennis H.	Attorney	Dev.
Dorfmeier, Glenn	SCDD applicant	Dor.

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Name	Description	Abbreviation
Derhagg, James J.	Special Assistant to BVA Chairman	Der.
Erspamer, Gordon P.	Attorney	Ersp.
Fox, Richard P.	Attorney	Fox
Graham, Harold	SCDD applicant	Grah.
Gretenhart, Frederick H.	Attorney (Swords to Plowshares)	Gret.
Heppenheimer, Harry	Attorney	Hep.
Hollander, Toby H.	Attorney	Hol.
Huskey, Ernest T.	SCDD recipient	Hus.
Johnson, R. Charles	Attorney	John.
Kopelson, Robert B.	Attorney	Kop.
Lenchek, Allen M.	Attorney	Len.
Marozsan, Stephen S.	SCDD Applicant	Mar.
McBee, Thomas	SCDD applicant	McB.
McNeil, J.E.	Attorney	McN.
Miles, Herbert	Attorney (Swords to Plowshares)	Miles
Praiswater, Eldon D.	SCDD applicant	Pras.
Ram, Michael F.	Attorney	Ram
Remcho, Joseph	Attorney	Rem.
Schroeter, Leonard W.	Attorney	Schr.
Siemers, Steven W.	Attorney	Siem.
Souness, Malcolm C.	SCDD applicant	Soun.
Staub, Emanual	SCDD applicant	Staub
Stavick, Margaret	Attorney, PTSD claims	Stav.
Turcotte, Thomas W.	Attorney	Tur.
Udall, Stewart L.	Attorney	Udall
Vaughan, Ralph C.	SCDD applicant	Vau.
Warehime, Reason F.	SCDD recipient	Ware.
Wilson, Doris	SCDD applicant (widow)	Wil.

III. BRIEFS AND OTHER FILINGS

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[Defendants'] Supplemental Answers to Interrogatories dated July 15, 1983	V.A. Supp. Int. Ans.
Exhibits to Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss filed July 19, 1983 and in Support of Plaintiffs' Motion for a Preliminary Injunction filed November 14, 1983	Ex.
Appellants' Application for Stay filed in U.S. Supreme Court on September 21, 1984, No. A-214	Stay App'n
Appellees' Brief in Opposition to Appellants' Application for Stay of Preliminary Injunction Pending Direct Appeal filed September 24, 1984, No. A-214	Stay Opp'n
Jurisdictional Statement filed October 9, 1984	Jur. St.

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No. 84-571

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Direct Appeal From the United States District Court For the Northern District of California

APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move to affirm the preliminary injunction issued by the district court based upon the following grounds: (1) It is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument, Sup Ct. R. 16(1)(c); and (2) Appellants have failed to demonstrate that the district court abused its discretion, Sup. Ct. R. 15(i), 16(1)(d).

STATEMENT

In 1862, responding to reports that unscrupulous attorneys were charging exorbitant fees to complete simple Civil War pension claim forms, Congress prescribed a maximum fee of $5.00 that a claimant could pay an attorney for services performed on pension claims. (*See* App. E). In 1864, the fee limitation was increased to $10.00. The $10.00 ceiling prevails today, despite the intervening adoption of service-connected death and disability compensation ("SCDD") and other benefits, massive V.A. program and budgetary growth, and the increased complexity of V.A. substantive rules and procedures.

Appellees include two non-profit organizations and four individuals. Three individuals are SCDD recipients, two of whom are totally dependent on SCDD for the necessities of life. The National Association of Radiation Survivors ("NARS") is a membership organization comprised principally of survivors of the atomic bomb testing program, including many SCDD recipients. Swords to Plowshares is an accredited service organization dedicated to serving Vietnam veterans, and specializes in handling Agent Orange claims. Albert Maxwell is one of the few living survivors of the Bataan Death March. He spent the remainder of World War II in Japanese POW camps, was a member of a POW clean-up detail at Hiroshima, and now suffers from a host of disabling conditions, including multiple myeloma, a terminal bone disease.

Reason Warehime is a thrice-wounded World War II and Korean War veteran who was among the occupational forces that entered Nagasaki in August 1945. In 1953, Warehime led the advance party at an atomic bomb test and was located a mere 3000 yards from ground zero. He is confined to a wheelchair, and suffers from lung cancer, partial paralysis, and a host of other service-connected conditions. The late Don Cordray succumbed to oat cell carcinoma in March 1984. He witnessed the detonation of Tests Able and Baker from the deck of the USS Fulton during Operation Crossroads in Bikini in 1946. Doris Wilson is the widow of a seaman who died of cancer in 1980 due to radiation exposure during Operation Crossroads.

Appellees charged, and the district court found, that they have a constitutional right to retain attorneys at their own expense unhampered by the $10.00 fee limitation. Appellees complained that the fee limitation deprived them of procedural due process under the Fifth Amendment and of their First Amendment rights to petition the government for a redress of grievances and to freely speak and associate. Unlike those who brought purely facial prior challenges to the fee limitation, appellees documented the adverse effects of the fee limitation on the initiation, development, prosecution, and success of SCDD claims. In addition, appellees proved how the fee limitation deprives them of meaningful access to the V.A. adjudication mechanism, which is the sole avenue by which veterans may obtain redress for service-connected deaths and disabilities. Specifically, appellees showed that the fee limitation discourages the filing of SCDD claims, causes minuscule success rates in complex claims, prevents the utilization of fundamental procedural rights (often as a consequence of waivers solicited by the V.A.), results in the abandonment of large numbers of SCDD claims, and retards correction of the frequent substantive and procedural errors made by the V.A. in adjudicating claims.

a. The description of the V.A. adjudicative system contained in the Jurisdictional Statement departs dramatically from the record, which contains a comprehensive picture of how that system operates in actual practice.[1] What follows is a summary of the V.A. adjudicative system based upon statements by the V.A.'s own witnesses or reflected in the V.A.'s own documents, and other undisputed facts below.

In contrast to the simple pension benefit available during the Civil War, a panoply of veterans benefits now exists, including SCDD. Since World War II, V.A. programs, rules, and regulations have proliferated, and the V.A. annual budget has swelled to over twenty-three billion dollars. V.A. claims procedures are extremely involved. Initial SCDD claims are made to one of fifty-seven V.A. regional offices. The development of a factual record at the regional level is crucial. SCDD claimants must "submit evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." 38 C.F.R. § 3.102. This involves proof that a disability exists or that a death has occurred, and that the disability or death was "service-related." 38 U.S.C. §§ 310-13. Claimants possess a limited number of procedural rights,

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[1] "Appearances to the mind are of four kinds. Things either are what they appear to be; or they neither are, nor appear to be; or they are, and do not appear to be; or they are not, and yet appear to be. Rightly to aim in all these cases is the wise man's task." Epictetus, *Discourses*, bk. I, ch. 27.

This is the first challenge to the fee limitation in which discovery was permitted and the true impact of the fee limitation exposed. The systemic problems uncovered below are a product of three independent prohibitions which have combined to insulate the V.A., and to widen the gulf between administrative appearance and reality. These include: (1) The *Feres* doctrine, which precludes veterans from suing the federal government for service-connected torts; (2) the prohibition against judicial review of V.A. decisions found in 38 U.S.C. § 211a; and (3) the fee limitation.

including a theoretical right to a hearing "at any time on any issue," a conditional right to a hearing transcript, the right to present witnesses and submit documentary and other evidence, and the right to appeal adverse V.A. decisions to the Board of Veteran Appeals ("BVA"). 38 C.F.R. § 3.103; (Ex. 19 at 105). A three-member "rating board," consisting of "medical," "legal," and "occupational" specialists, reviews the veteran's submissions, and prepares a "rating" either granting or denying the claim. *See* 38 U.S.C. § 355; (Exs. 30, 34, 37, 161). The rating board uses a complicated schedule for rating disabilities, which prescribes specific disability percentages for hundreds of conditions. 38 C.F.R. §§ 4.1-4.150; (Ex. 152).

V.A. claim denials are communicated in a computer notice called a Notice of Decision ("ND"). Typically, the ND perfunctorily expresses a denial without factual findings or any explanation. (Comp. Ex. K; Ver. 144). If dissatisfied with the V.A.'s decision, the veteran may submit further evidence and/or request a hearing within sixty days. (*See* Exs. 158, 162).

To challenge an adverse decision, the claimant must file a "Notice of Disagreement" ("NOD") within one year. 38 U.S.C. § 4005; 38 C.F.R. §§ 19.118, 19.119(a). Upon receipt of the NOD, the V.A. either revokes its initial decision or prepares a "Statement of the Case" ("SOC") in which the V.A. frames the issues for appeal. (Ver. 303). The SOC summarizes the decision, the factual record, and applicable law, 38 C.F.R. §§ 19.119(b), 19.120, and constitutes the final decision of the regional office. (*See, e.g.*, Exs. 167 at 101-05, 168 at 135-41). "If the claimant takes no action to follow up on the NOD (which is frequently the case), the file is closed." (Ex. 70 at 71; *see also* Exs. 75, 99 at 6-14).

The claimant can perfect an appeal by filing a "substantive appeal" within sixty days from the date of mailing of the SOC, 38 C.F.R. § 19.129(b), which must "set out

specific arguments relating to errors of fact or law." 38 C.F.R. § 19.123(a). The claimant is presumed to agree with every statement of fact contained in the SOC to which no exception is taken in the Substantive Appeal. 38 C.F.R. § 19.121(b)(3).

Upon filing of a substantive appeal, the original claim file is sent to the BVA in Washington, D.C., for decision. (Ver. 354-55; Ex. 87 Attach. II). Argument and testimony may be presented to a BVA panel, which may or may not be the panel that actually decides the appeal. (Wood. 182-83). *See* 38 C.F.R. § 19.182. Very few BVA appeals result in personal hearings. (Ex. 70 at 71). Consequently, most BVA appeals are resolved based upon the written record transmitted by the regional office, together with a short statement of the veteran's contentions. (*Id.* at 71-72). No cross-examination is permitted in BVA hearings, 38 C.F.R. § 19.157(c), and the BVA "will not require the appearance of any Veterans Administration official or other person" at a BVA hearing, 38 C.F.R. § 19.165(a). (*See also* Ver. 228-30; Wood. 109). The BVA disposes of each issue upon appeal by allowance, denial, remand or dismissal. 38 C.F.R. § 19.180(b). The BVA is bound by V.A. regulations, instructions of the V.A. Administrator, and precedent opinions of the V.A. general counsel. 38 U.S.C. § 4004(c).

The BVA reverses determinations of regional offices in approximately 13% of perfected appeals, and 15% of V.A. appeals result in remands. (Ex. 77; Ver. 134-35). Thus, in over one quarter of the claims reaching the appeal stage, the BVA determines that the regional process (including reconsideration) is deficient. The BVA may reconsider its own decisions based upon errors of fact or law, 38 C.F.R. § 19.184(a), but reconsideration seldom occurs. (Ex. 78 at 2). Decisions of the BVA are final, and judicial review of V.A. decisions is expressly prohibited. 38 U.S.C. § 211(a).

In 98% of BVA appeals, claimants are not represented by attorneys. (*See* Ex. 78). Service representatives handle

87% of perfected appeals and 11% of appealing claimants appear *in pro per.* (Ex. 75). No representation statistics are maintained by V.A. regional offices and representation by attorneys is "not common at all." (Ver. 90-91). Frequently, veterans appear *in pro per.* (Ver. 339). Applications for the $10.00 contingency fee are virtually non-existent. (Ver. 240; V.A. Int. Ans. 3). Thus, the legal services provided by attorneys to veterans are almost invariably *pro bono.*

Several complex categories of SCDD claims have emerged in the last decade, including: (1) claims by veterans exposed to radiation during the atomic bomb tests or to toxic defoliants such as Agent Orange; and (2) post-traumatic stress disorder ("PTSD") claims, first recognized as a disabling condition by the V.A. in 1981. (Haw. 137-41; Jac. 103-07, 134, 167-68; Phil. 31-32, 73-76; Exs. 177-81).

V.A. rules, regulations, and procedures concerning SCDD are intricate and extensive. (Stav. Aff ¶5 at 13-17; Haw. 150-52; Jac. 167-76; Phil. 18-19, 79-84; Ver. 414-29, 431-34, 443-48); *see generally* 38 C.F.R. V.A. regulations contain a wide variety of procedural requirements, many of which are pitfalls for the unwary, such as jurisdictional time limitations. *See* 38 C.F.R. §19.118(a); (Vau. Decl. ¶¶7-8). "Well, as you can appreciate, the claims process is a very complicated process . . ." (Ver. 441). "[V]eterans law consists of a large and relatively complicated body of statutes and regulations that is overwhelming to legal services staff not required to deal with it regularly." (Ex. 70 at 59).

Most of the V.A.'s procedural and substantive standards are unpublished and unavailable to claimants. Procedural Manual M-21-1 (Ex. 17), BVA Manual (Ex. 45), Program Guide 21-2 (Ex. 19), circulars (*e.g.*, Ex. 5), Field Appellate Procedures Manual M1-1 (Ex. 150), adjudication memoranda (Ex. 85; Ver. 299), "informal" memoranda (*e.g.*,

Ex. 17 at 137-38; Wood. 24-27), precedent opinions of the general counsel (Stan. 308-09), and BVA decisions are examples of unpublished sources of V.A. substantive and procedural rules. (Stav. Aff. ¶5 at 15; Ver. 113-15, 207-11, 342-45; Wood. 93-95, 153-54, 197-200; Stan. 277-80, 282-86, 291; Exs. 90, 91; Miles Decl. ¶5; *see also* Ex. 152). "That's the basic point [illegible] we have many directives. And it's a matter of knowing all of them that pertain to a particular point. So it behooves one to keep a cross-index. But they are one as binding as another." (Ver. 344). "[A]rbitrary and unpublished changes in these rules place any individual veteran without representation at an unfair disadvantage." (Miles Decl. ¶5; *see* Exs. 17, 19, 90, 91, 150, 152). In addition, substantive or procedural rules from different V.A. sources often conflict. (Stav. Aff. ¶5D at 19; Ver. 431-34).

Most veterans are unacquainted with V.A. substantive and procedural rules, and are unfamiliar with or lack the expertise to utilize their rights to offer documentary evidence, present their causes at hearings, exercise appellate rights, and exhaust administrative remedies. (John. Decl. ¶¶3-4; Vau. Decl. ¶¶7-8; Demp. Decl. ¶7; Siem. Decl. ¶4; Burke Decl. ¶13; Ver. 153, 210-11, 546-47). Unrepresented veterans experience great difficulties in prosecuting SCDD claims: "[P]eople that don't have representation . . . generally don't have the wherewithal on how to develop their claim . . . . How are they going to know VA procedure? They many times don't really get all their medical records, service medical records. I don't think they do as well generally when they represent themselves." (Phil. 18). The seemingly simple task of locating and obtaining service medical and military records often presents an insuperable obstacle for unrepresented veterans. (DeN. Aff. ¶9; Caron Decl. ¶12; Fox Decl. ¶¶15-17;

Tur. Decl. ¶10; Bakal Aff. ¶1; Stav. Aff. ¶¶5 at 28, 10 at 38-39; Miles Decl. ¶6; Dor. Decl. ¶¶7-8; Max. 85-88; Jac. 234; Wil. Decl. ¶3). The government has lost or destroyed the service records of many veterans. (Soun. Decl. ¶3; Pras. Decl. ¶10; Ver. 63-65, 541-44; Stan. 230; Ex. 19 at 53).

b. The complexity of and veterans' unfamiliarity with V.A. rules, practices and procedures, the absence of legal representation, and the shortcomings of lay service representatives combine to discourage claimants' utilization of procedural rights, cause a startling percentage of SCDD claimants to abandon their claims or appeals, and create a situation in which the merits of large numbers of claims are never reached. (Pras. Decl. ¶9; Burke Decl. ¶13; Phil. 49-50; Cor. Decl. ¶5; Bian. Aff. ¶7; Bit. Aff. ¶4; Max. 81-83; Ware. Decl. ¶12; McB. Decl. ¶11). "Everyone knows lots of claimants are frustrated with the process . . . and have given up on the system . . . ." (Stan. 110-11; *see also* Ver. 559-63; Max. 83). Furthermore, many potential SCDD claimants fail to institute claims because they are unable to retain attorneys to represent them. "Many veterans chose not to go forward because of not being able to hire counsel." (Bakal Aff. ¶1; *see also* Udall Aff. ¶¶1-3; DeN. Aff. ¶5).

While the fee limitation causes some veterans to forsake filing or to abandon claims, many claims are "abandoned" unknowingly. A claimant's failure to comply with procedural requirements often unwittingly results in a constructive claim denial. (Gret. Decl. ¶¶5, 6; Stav. Aff. ¶5 at 29; Ver. 303-07). The claim is automatically denied without notice to the claimant by means of a "record purpose disallowance" upon expiration of the applicable response deadline. (Ver. 303-04; Wood. 63-69; Ex. 17 at 116-17). "This occurs quite frequently where someone is advised by us that they must produce certain evidence and they don't respond to the letter. We make a record purpose disallowance. The claim is considered abandoned a year from the date of our request." (Ver. 304). The veteran may labor indefinitely under the misimpression that his or her claim is still pending. (Wood. 65, 147). "We don't notify them that the decision is final without some inquiry." (Ver. 311). Significantly, "[t]hey're unaware of the record purpose disallowance, so there's no opportunity to appeal." (Ver. 307). An untimely substantive appeal means that, absent a rare finding of a clear and unmistakable error, the merits of an appeal are never reached. (Gret. Decl. ¶5; Ver. 155, 462-63; Ex. 17 at 141). The record purpose disallowance entails a forfeiture of accrued or retroactive benefits if the claim is ever reopened. (Ver. 306); 38 C.F.R. §3.158(a). An overwhelming number of disallowances constitute "record purpose" disallowances and few abandoned claims involve formal withdrawals. (Wood. 236; Ex. 99 at 6-14).

Although claimants who exercise the right to a hearing are almost twice as apt to prevail (Stan. 122, 126, 132-33; Ex. 63), exceedingly few veterans actually request hearings. (Exs. 65, 98; Bit. Aff. ¶4; Ver. 326; Wood. 215-16; Haw. 42, 161; Jac. 8, 28, 127, 144, 201-02). Only 12,196 hearings were held nationally in FY 1982 out of 1,030,884 total actions taken, an incidence of but 1.2%. (Ex. 98 at 3; Wood. 216). Appellate trends are just as pronounced: "[o]f more than 34,000 cases decided by the BVA in FY 1978, only 1,452 involved personal appearances." (Ex. 70 at 81; *see also* Ex. 126; V.A. Int. Ans. 17(a), (b)). "[P]ersonal hearings comprise a very small part of the Board [BVA] workload." (Stan. 268). Given that nearly all claimants are "represented" by service representatives and few hearings are requested, it follows that service representatives (unlike attorneys) do not press for personal hearings. (Jac. 196). "I suspect the service representatives . . . only have hearings where the claimant insists on it or where they think the decision is particularly outrageous in light of the evidence of record." (Jac. 29-30).

Even in the few instances where a veteran exercises the right to a hearing, documentary evidence is rarely submitted, expert testimony is infrequently offered, and normally the claimant alone testifies. The average V.A. hearing lasts only 39.5 minutes. (Ex. 74; Stan. 261-64, 267).

Similarly, the vast majority of unsuccessful claimants "waive" their right to appeal. For example, only 1,954 of the roughly 250,000 appealable San Francisco region decisions (.9%) resulted in NODs in FY 1982. (Ver. 163-64; *see also* Max. 46-48, 81-83). The pattern of frequent waiving of appellate rights continues after an appeal is initiated by filing a NOD. (Ver. 328). The claim abandonment rate between the NOD and substantive appeal stages ranges from 25.6% to 34.8%. (V.A. Int. Ans. 18(c); *see also* Bit. Aff. ¶4). Moreover, the appeal abandonment rate after a substantive appeal is filed and prior to a BVA decision, a period during which no action by the veteran is required, ranges from 2.3 to 4.7%. (V.A. Int. Ans. 18(d)). Significantly, the vast majority of "abandoned" appeals involve inaction by a veteran rather than deliberate action. (Ex. 99 at 6-14; Wood. 236-39). For example, in the first part of 1983, 81.1% of San Francisco region claims in which NODs were filed were "closed" due to the veterans' failure to respond to the SOC. (Ex. 99 at 13). Fewer than 1% were formally withdrawn. (*Id.*; Wood. 236). "Quite a few" unrepresented claimants become "extremely frustrated" and give up. (Wood. 237). In contrast, attorneys almost uniformly follow through on claims to their completion and do a "good job." (Wood. 100; *see also* Ver. 522-24; Ram Supp. Decl.).

Furthermore, a substantial number of veterans neglect to request a hearing transcript, although one is always prepared for the V.A.'s own use. (Ver. 250, 411-14; V.A. Int. Ans. 20). In addition, veterans commonly do not exercise their right to review their claim files, and veterans who have scheduled hearings "fairly commonly" do not

appear. (Ver. 75, 253). Debilitative diseases or conditions suffered by veterans often physically prevent investigation and pursuit of a valid claim or cause claimants to unintentionally abandon their claims. (Cor. Decl. ¶10; Ver. 28-49, 52-53).

By the V.A.'s own self-analysis and admission, erroneous deprivation of SCDD is frequent, as is the incidence of procedural irregularities. (Exs. 10 at 12-15, 85, 94 at 43, 98, 100, 187 *passim;* Wood. 229-32, 246-49; Jac. 167, 261-63; Haw. 69, 80-85, 133). The BVA reverses or remands more than a quarter of the few perfected appeals, and the V.A. has predicted a far higher reversal rate if judicial review of V.A. decisions were allowed. (Ex. 114 at 57-61). It follows that a large number of abandoned claims would have resulted in a grant of compensation had claimants been able to follow through on their claims or had they been represented by counsel.

c. The record reveals many dramatic departures from the Jurisdictional Statement's sanitized picture of regularity drawn from the Code of Federal Regulations ("CFR"). Actual adjudicative policies and practices often markedly diverge from CFR requirements. For example, the regulation that guarantees claimants a right to a hearing "at any time on any issue," 38 C.F.R. § 3.103(c), which the V.A. acknowledged is an "integral part" of due process, was jettisoned by the V.A. in an adjudication memorandum:

> Although VAR 1103 permits a hearing anytime on any issue, we do not have the resources to operate in this way. Hearings should *follow* the Statement of the Case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. We can always explain why a hearing is not appropriate at a particular stage in processing. In cases previously disallowed, the hearing process must be discouraged

> as a means of presenting new and material evidence. . . . I know you are aware of these points but the appellant isn't. To effect this change in policy, employees will obtain the initials of a Section Chief on all requests to 21 to schedule a hearing.

(Ex. 17 at 137-38; Ver. 274-86). Indeed, the V.A.'s long-standing policy has been to ignore 38 C.F.R. Section 3.103 (c), and honor hearing requests only *after* a decision has been rendered, a NOD filed, and a SOC prepared. (*Id.*; Haw. 146-48; Jac. 30-33; Ware. Decl. ¶ 9). Thus, unrepresented veterans are denied hearings before a decision is made—the most meaningful stage in the adjudication of claims. (Wood. 14-16, 28-29; Ver. 276). Because few claims proceed as far as an NOD, the impact upon the 99% of claimants who do not appeal is considerable. Moreover, the few claimants who exercise their truncated post-decisional "right" to a hearing bear the added burden of persuading the rating board to change its mind. Significantly, a rating board member recalled but one instance in ten years in which a personal hearing persuaded him to change an initial decision. (Haw. 43-44, 146, 159-60; *see also* Jac. 29).

Moreover, unrepresented claimants frequently are targets of concerted efforts by V.A. officials to induce them to surrender important procedural rights, *e.g.*, to a hearing. (*See* Comp. Exs. F, H, J; Exs. 2, 11, 17 at 137-38, 18 at 8, 83, 100, 163; Wood. 285-89). The V.A. pattern letter sent to unrepresented claimants who request hearings contains the following false or misleading statements: (1) written statements are equivalent to live testimony; and (2) a hearing request would cause substantial delays before decision. (Comp. Exs. H, J; Ver. 81-85; *see also* Wood. 55-57, 294).

The V.A.'s practice of coaxing waivers from unrepresented claimants is particularly draconian because, in the related area of military discharge upgrading proceedings,

"[t]he chance of success improves markedly when the veteran personally appears before the Boards, a step most veterans are probably unwilling to take without representation." (Ex. 70 at 14). Indeed, the V.A.'s own statistics illustrate that exercise of the right to a hearing is a meaningful incident of a successful V.A. claim. (Ex. 63; Ver. 78; Wood. 58; Stan. 122, 126, 132-33). The SCDD claim allowance rate where BVA hearings were held is nearly double that for appeals in which no hearing occurred. (V.A. Supp. Int. Ans. 17(a),(b) (22.1% vs. 12.9%); *see also* Ex. 126 at 4).

d. The Jurisdictional Statement again departs from the record in describing the lay representation afforded by service organizations. The uncontroverted evidence below demonstrates that service representatives lack the legal training, ability, finances, and resources to adequately represent veterans, especially in complex claims.

The inadequacy of service representatives stems from multiple sources: (1) lack of legal training and skills, and shortcomings in abilities, advocacy, and experience; (2) insufficient financial resources for investigation, use of experts, research, document searches and briefing; and (3) severe overwork and chronic case overload. (Blek. Decl. ¶¶ 2-7; Tur. Decl. ¶ 5; Bian. Decl. ¶¶ 3, 5, 6; Miles Decl. ¶ 5; John. Decl. ¶ 5; Fox Decl. ¶¶ 11-13; Bit. Aff. ¶¶ 4-6; Stav. Aff. ¶ 6 at 32-34; Bal. Aff. ¶¶ 3-4; Ver. 198-201; Stan. 307-08; Ex. 70 at 47-49). The shortcomings of service representatives are magnified in complex claims such as atomic veteran, Agent Orange, and PTSD claims. (McB. Decl. ¶ 13; Burke Decl. ¶¶ 9-12; Aut. Decl. ¶ 5; Max. 37-42, 55-67; Miles Decl. ¶ 5; Bal. Aff. ¶¶ 3-6; Hus. Aff. ¶ B5; *see also* DeN. Aff. ¶ 6; Wood. 93).

"Almost none" of the service representatives is an attorney, and none receives any formal training from the V.A. (Stan. 164-65; V.A. Int. Ans. 33). Nor does the V.A. attempt to assure their competence as representatives:

"Now, the Veterans Administration must accredit each service officer who appears on a regular basis to present claims. But most of this accreditation, as I understand it, goes to good character and that kind of thing, rather than as such competence." (Stan. 323). "They [local service officers] have limited ability, and some of them . . . might even be a volunteer or they're working for the county." (Wood. 192).

The inadequacies of service representatives were documented below in numerous examples drawn from appellees' own claims as well as from a random series of SCDD claim files produced by the V.A. The service representatives' role is typically limited to aiding the V.A.'s search for veterans' medical and service records, occasional assistance in completing basic V.A. forms, and perhaps appearing at any formal V.A. hearings requested. (Haw. 4, 62; Jac. 151-54; Exs. 177-81, 194; Pras. Decl. ¶7-9; Bal. Aff. ¶¶ 3-5, 8, 10). Frequently, veterans "represented" by service representatives prepare their own claims. (Jac. 42-43, 55-56, 67-71, 87, 93-94, 222-23; Max. 37-42). "Most of the time they [service representatives] don't go out and try to develop the evidence on their own." (Stan. 170; *see also* Max. 48-52). "[I]n almost all cases, the record will consist of the claimant's service history and his service medical history." (Stan. 171).

Legal and factual briefing of claims by service representatives, of crucial importance given the low percentage of claims in which hearings are held, is almost nonexistent, and documents are rarely offered to support a claim. (Tur. Decl. ¶ 5; Stan. 182; Wood. 80-81).

> In the majority of cases where the veteran is represented by a veterans' service organization, the veteran's position is typically stated in a one-page handwritten statement of contentions (without argument). . . . It must be stressed that the "one-page handwritten brief" is standard practice among the

> service organizations, and that this practice appears on its face to be less than optimum representation . . . .

(Ex. 70 at 72, 89). The typical substantive appeal prepared by a service representative (which should detail every disagreement with the SOC), is handwritten, comprises one page or less, and fails to respond to the factual points in the SOC. (Ver. 223; Stan. 157; *cf.* Exs. 167, 168).

Service representatives fail to utilize even rudimentary document-gathering techniques, and rarely seek assistance from experts or consultants, even though it is often critical to success. (Wood. 183-84; Caron Decl. ¶ 7; Miles Decl. ¶ 5; Stan. 188; Ver. 234-35). Fundamental legal or tactical errors are common and obvious legal points are frequently overlooked. (Tur. Decl. ¶ 5; John. Decl. ¶ 5; Phil. 17, 33, 60-61; Jac. 177-86; Exs. 158, 162, 172; Ver. 199). Service representatives "seldom" raise questions of law upon appeal, resulting in waivers of any errors of law. (Stan. 159, 291).

"It is normal policy with many of these lay representatives from service organizations to not even review the veteran's case until the day of the hearing." (John. Decl. ¶ 5). Likewise, a service representative's first meeting with the claimant usually occurs thirty minutes before a scheduled live hearing. (Pras. Decl. ¶¶ 7-8; McB. Decl. ¶ 13; Aut. Decl. ¶¶ 5-6; Hus. Aff. ¶ 5; Clapp Decl. ¶ 8; Cor. Decl. ¶ 12; Ware. Decl. ¶ 7; Wil. Decl. ¶¶ 4-5; Soun. Decl. ¶¶ 8-9; Ver. 225; Stan. 166; Burke Decl. ¶¶ 8-9; *see* Ex. 115). At hearings, service representatives commonly rely totally upon the rating board to ask questions. (Ver. 510-11; Ex. 162).

Service representatives handle the vast majority of BVA "hearings" by submitting "informal hearing memoranda" which typically consist of two pages or less, rarely cite authority, and supplant a live hearing. (Stan. 168-69, 184-85; *see also* Ex. 124). The following service representative's statement, designed to "allow the representative to clarify any points in contention or elaborate on them

before the final referral to the Board of Veteran Appeals," is typical of those prepared by service representatives:

> The veteran appeals for service connection for sciatic nerve damage which he contends was caused by injections after contamination by atomic fallout. He believes his arthritis is of many years standing and had its inception during service. The third part of the appeal is for an increased evaluation of his Duodenal ulcer.

(Comp. Ex. A; Cor. Decl. ¶ 9; Ver. 224-25, 486-94; Stan. 184; Exs. 153, 154, 156-57).

Overwhelming caseloads exacerbate the problem. In FY 1982, twelve to fourteen national service officers handled about 95% of the 1,328 central office hearings, or nearly 100 each, as well as a similar percentage of claims in which hearings were waived. (Stan. 299-300). "[T]he case loads of the national level staff appear to be crushing—about 5 cases to present per working day. It is difficult to conceive how effective representation can be provided for that number of cases." (Ex. 70 at 49; *see also* Phil. 33; Jac. 20, 22, 26).

The shortcomings of service representatives and the adjudicative process are starkly evidenced by success rates in complex claims. None of the more than 6,000 Agent Orange V.A. claims has been granted. (Ex. 4; Ver. 116-20; Wood. 138-40). Similarly, only fifteen of over 2,000 atomic veteran claims have been granted, each of which was denied in the initial instance. (Exs. 46, 54 at 9). In short, unrepresented veterans in complex claims lose.

Similarly, the necessity of legal expertise in the adjudication of SCDD claims is demonstrated by the fact that V.A. attorneys pervade every aspect of the adjudication of claims. Over 800 V.A. staff attorneys decide claims, prepare ratings and SOCs, draft BVA opinions, and perform a host of other functions in the adjudicative process. (V.A. Int. Ans. 21, 22; Jac. 10, 144-45, 189-92; Phil. 12-15, 51-52, 69-71; Stan. 32-34). A V.A. rating board member conceded:

> "[I]n a number of cases . . . the veterans would be better off having attorneys represent them, because . . . they would possibly get a fairer shake." (Jac. 20).
>
> [T]here are some cases that are denied because all the evidence hasn't been obtained, and other cases I think are denied because some rating specialists misinterpret the law. . . . [A]n attorney can argue the law much better than a lay person. Of course, an attorney could amass a much better brief of the facts than a lay person could.

(*Id.* at 26; *see also* Hol. Aff. ¶¶ 4, 5; Atlee Decl. ¶ 12; Jac. 15; Soun. Decl. ¶ 6; Phil. 52).

e. Appellants' characterizations of the V.A.'s process as non-adversarial and its own role as supportive contradict the express findings of the district court and find no support in the record. (App. A at 31a-36a). The true, adversarial nature of the relationship between the V.A. and SCDD claimants is emphasized by attorneys familiar with the V.A. and claimants alike. (McB. Decl. ¶¶ 8-12; John. Decl. ¶ 7; Miles Decl. ¶ 6; Caron Decl. ¶¶ 8-9; Bit. Aff. ¶4; Stav. Aff. ¶ 9 at 36-38; Dor. Decl. ¶ 11; Siem. Decl.¶ 4; Cor. Decl. ¶ 13; Wil. Decl. ¶ 6; Ware. Decl. ¶ 12; *see also* Ver. 274-97; Max. 91; Stan. 258-59). The interests of veterans and the government, which is supposed to grant the claimant "every benefit that can be supported in law *while protecting the interests of the Government*" (emphasis added), are not harmonious. 38 C.F.R. § 3.103(a). Significantly, the claimant possesses the burden of proof, 38 C.F.R. § 3.102, and the V.A. in effect acts as both the opposition and judge of the validity of a claim. (Stav. Aff. ¶ 9 at 36-38; McN. Aff. ¶ 7).

Contrary to its own rules and regulations, 38 C.F.R. § 3.103; (Ex. 17 at 142-43 § 18.05), the V.A. fails to assist veterans in developing the facts necessary to support their claims. (Tur. Decl. ¶ 9; Bit. Aff. ¶ 4; McB. Decl. ¶¶ 8-11; Burke Decl. ¶ 13; Pras. Decl. ¶ 10; Dor. Decl. ¶ 7; Ware. Decl. ¶ 9; Grah. Decl. ¶ 9; Demp. Decl. ¶ 7). The "assist-

ance" rendered by the V.A. is typically limited to seeking service and medical records. (Ver. 41). "Well, it's up to the claimant first, yes. I would say the primary responsibility is for the claimant to try to develop the information and the documentation to establish this claim. And then we are secondarily responsible in certain areas." (Wood. 156-57).

Thus, the V.A. makes no effort to cross-reference atomic radiation claims to detect patterns of exposure or disease or locate or interview witnesses to seek information to support a claim. "Ordinarily the burden of that falls to the veteran." (Ver. 23, 126, 313, 480-81; Jac. 104; Ex. 187; Wood. 78, 167-68; Max. 51-52; Stan. 249-51). "We really wouldn't know where to begin to look . . . ." (Ver. 316). Likewise, the V.A. does not request information about similar atomic radiation claims from other regional offices. (Ver. 23, 314). Incredibly, the San Francisco region, for example, has never requested an expert medical opinion on causation or exposure respecting any atomic veteran claim it has adjudicated. (Ver. 36, 51-52, 231, 235; Haw. 163; Jac. 80). The V.A. requested only 202 medical opinions nationwide in FY 1982, or roughly one for every 10,000 claims. (Der. Aff. ¶ 2). Despite the vast number of pertinent documents maintained by the federal government and private entities, the V.A. by directive relies exclusively on the Defense Nuclear Agency to supply information about atomic test programs and radiation exposure levels. (Wood. 208-13; Ex. 84; Ver. 20-23, 98-103, 149-51, 314-19; Stan. 229, 238; Ex. 12 at 33-36). "I can't understand the rationale behind it [the directive]. I still think we should be permitted to develop relevant, persuasive evidence wherever it is." (Wood. 210).

Investigative shortcomings are also common in other SCDD claims. (Bit. Aff. ¶ 3). The V.A. rarely invokes its statutory power under 38 U.S.C. Section 3311 to obtain documents in support of a claim. (Wood. 279). Indeed, the V.A.

has issued only five subpoenas since 1976, most of which sought proof of claimant fraud. (V.A. Int. Ans. 25; Ver. 61-62). Unfortunately, the claimant "is generally unable to discover or obtain government documents." (John. Decl. ¶ 7; *see also* Ver. 255; Miles Decl. ¶ 6; Ex. 114; Wil. Decl. ¶ 3).

The V.A.'s meager development of facts stems in part from its personnel policies and productivity measures. The San Francisco region employs seventy-six claims examiners and clerks to handle approximately 62,000 claims (816 claims per employee), who collectively are allotted only 2.84 hours to develop, process, and decide an initial SCDD claim. (Ex. 9; Ver. 8-13; Haw. 110-13; Jac. 129-30). Time credits are even more modest for deciding reopened claims or appeals, and no credit is given for responding to claimant correspondence. (Wood. 48-54; Ver. 54-59, 167, 194-95). Performance is assessed based in part upon average claim handling time, a system which encourages claims examiners to process claims expeditiously. (Ver. 173; Wood. 53). "[I]t is ludicrous to have such production standards. But they exist, and there is nothing I can do about it, so I live within the system." (Jac. 131). Correspondingly, regional offices that process claims quickly are more highly rated. (Wood. 245-46; Ex. 100).

ARGUMENT

The Jurisdictional Statement represents an attempt to shift the arena in this appeal from the sweeping record relied upon by the district court to an ill-defined legislative one. Thus, appellants avoid the voluminous set of uncontroverted facts upon which the preliminary injunction was based, and frequently make statements dramatically inconsistent with those facts and the findings made by the district court. Appellants even go so far as to suggest that it was *error* for the district court to decide the constitutionality of the fee limitation based upon "the

record that the parties develop in the particular lawsuit." (Jur. St. at 19). Instead, appellants resort to selected quotations, often misleadingly edited, from a few legislative committee reports. Appellants' disregard of the record does not make that record disappear or make some other record that upon which the propriety of the preliminary injunction should be judged. As loathe as appellants might be to appeal based on the record below, it is that record they must confront. *Economic Development Corp. v. Model Cities Agency*, 519 F.2d 740, 744 (8th Cir. 1975) (when ruling on propriety of a preliminary injunction, appellate court must base its review on the record presented to the trial court).

Notably, appellants do not dispute any of the facts upon which the district court determined that the ability to retain attorneys is crucial given the characteristics of the V.A. adjudicative process. (App. A at 23a-38a). Nor do appellants dispute the critical role that the assistance of counsel plays in due process. (*See* cases cited in App. A at 23a-26a).

The Jurisdictional Statement also disregards two of the three factors a court must analyze to determine whether a preliminary injunction ought to issue—the likelihood of irreparable injury, and the balance of hardships—focusing exclusively on probability of success on the merits. Appellants have thus conceded that the district court properly determined that appellees would suffer irreparable injury absent a preliminary injunction, and that the balance of hardships weighed heavily in favor of appellees. (App. A at 48a-51a). Moreover, appellants argue, without citation, that the abuse of discretion standard of review[3] ought to be discarded because of the

[3]Both Supreme Court Rule 15(i) and case authorities uniformly require application of the abuse of discretion standard in appellate review of preliminary injunctions. *Doran v. Salem, Inc.*, 422 U.S. 922, 934 (1975); *Mayo v. Lakeland Highlands Canning Co.*, 309 *(f.n. continued)*

voluminous record below, the very record they have elsewhere spurned. (Jur. St. at 23 n.15). In so doing, appellants have tacitly admitted they cannot establish that the district court abused its discretion, the sole issue involved in this interlocutory appeal. Finally, appellants virtually ignore appellees' First Amendment claim.

Because this appeal depends upon each of the above definitional and analytical errors, it is manifest that the questions on which this appeal rests are so unsubstantial as not to require further argument. For this appeal to succeed, this Court would have totally to discount the record below, disregard appellees' First Amendment claim, transform the three-part preliminary injunction test into a unitary one, and reject uniform precedent requiring application of the abuse of discretion standard in appellate review of preliminary injunctions.

a. The Jurisdictional Statement attempts to divorce the facts from the law, disregarding the crucial role that factual circumstances play in constitutional analysis, especially in claims involving fundamental fairness and access to government agencies. (App. A at 11a). Likewise, appellants disregard the analytical areas of inquiry in a due process case—the private and government interests involved, the risk of erroneous deprivation, and the value of additional safeguards. (*Id.* at 19a-20a). Rather, appellants rely totally upon a narrow argument based on *stare decisis*. Focusing exclusively on appellees' due process claim, appellants hinge their claim to legal error on two decisions finding the fee limitation to be facially valid against due process attack by SCDD applicants. Appellants' own counsel described these decisions as "an anomaly

U.S. 310, 317 (1940); *United States v. Corrick*, 298 U.S. 435, 437 (1936); *Love v. Atchison & T.&S.F. Railway Co.*, 185 F. 321, 331 (8th Cir. 1911) (appeal from order granting preliminary injunction does not invoke judicial discretion of appellate court and should not be reversed unless proof clearly establishes an abuse of discretion).

in the law" and "unsatisfactory." (Mt. Dism. Tr. at 10). These decisions have no application to the type of due process attack mounted by appellees below.

Appellants primarily rely on a summary affirmance in *Gendron v. Saxbe,* 389 F. Supp. 1303 (C.D. Cal.), *aff'd per curiam sub nom. Gendron v. Levi,* 423 U.S. 802 (1975), where a lone SCDD applicant mounted a facial challenge to 38 U.S.C. Section 3404. The district court construed *Goldberg v. Kelly,* 397 U.S. 254 (1970), as holding only that recipients of statutory benefits, as distinguished from applicants such as Gendron, have a Fifth Amendment property interest in statutory benefits. 389 F. Supp. at 1305-06. Notwithstanding this, and the fact that the procedural requirements of due process vary with the particular circumstances, appellants expansively suggest that the summary affirmance in *Gendron* insulates the fee limitation from constitutional attack. *Gendron,* however, is readily distinguished.[a]

The Jurisdictional Statement in *Gendron* presented only the following three issues of potential moment here: (1) Does an applicant have a property interest in disability benefits? (2) Does Section 3404 deny an applicant's right to procedural due process? (3) Did the district court

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[a]Summary dispositions have binding effect with respect to a particular issue only if that issue was "(1) actually decided in the [court below], (2) necessary to the . . . decision [of the court below], (3) presented [to the Supreme Court] in the jurisdictional statement, and (4) necessarily decided by the Court in making its summary disposition." *Cherry v. Steiner,* 716 F.2d 687, 690 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 1719 (1984) (citing *Mandel v. Bradley,* 432 U.S. 173, 176 (1977) (*per curiam*)); *see also Hicks v. Miranda,* 422 U.S. 332 (1975). The precedential significance of a summary affirmance must be assessed in the light of all facts. *Mandel v. Bradley,* 432 U.S. at 177. Furthermore, only questions adequately presented in the record are resolved by a summary affirmance. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83 (1979).

improperly refuse Gendron's untimely request to submit evidence on the adequacy of representation by veterans service organizations? (Ex. 101). It is impossible to determine whether, in summarily affirming, the Supreme Court found it necessary to reach the second and third issues or based its decision solely on the first issue.

Appellees' due process claim presents at least four due process questions not considered in *Gendron.* First, *Gendron* involved a purely facial challenge—that the fee limitation should be declared unconstitutional without resort to evidence such as the characteristics of the disabled veteran population, the emergence of complex claims, the effects of the fee limitation upon the prosecution and success of claims and adjudicative behavior, or the ability of service representatives to handle V.A. claims. These facts are critical to the determination of what process is due. *See Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976). By contrast, the instant case involves an as-applied due process attack based upon extant adjudicative rules, procedures, practices and behavior. Unlike *Gendron,* the record here plainly documents the drastic effects of the fee limitation, including waivers of fundamental procedural rights, abandoned claims, infinitesimal success rates in complex claims, hearing waivers, forsaken appeals, and administrative misconduct *vis-a-vis* unrepresented claimants. This considerable wealth of evidence was completely unrebutted below. Courts have long recognized that a statute may be constitutional on its face, but unconstitutional as applied to particular plaintiffs or facts of record. (*See* cases cited in App. A at 10a-11a; Stay Opp'n App. H at 321-22).

Second, Gendron was not a recipient of disability compensation and was not dependent on SCDD for the necessities of life. (App. G). Indeed, the *Gendron* court expressly based its holding upon Gendron's applicant status. 389 F. Supp. at 1306. This holding obviated the need to reach the second

stage of the due process calculus—the balancing of interests. Significantly, Gendron's status as a mere applicant for disability compensation was repeatedly emphasized in the Government's Motion to Affirm in *Gendron*. (Stay Appl. App. D at 7-9). Thus, the Supreme Court's summary affirmance may have been based on Gendron's applicant status. At bar, three individual appellees and many members of the organizational appellees are SCDD recipients whose statutory entitlements stand admitted, whose disability compensation has been reduced or threatened with reduction, and who are primarily dependent upon SCDD for the necessities of life. (Comp. ¶¶ 2-21; Vau. Decl. ¶ 4; Ware. Decl. ¶ 10; Atlee Decl. ¶ 3; Max. 78-80). Notably, the only two decisions to consider whether *recipients* of veterans benefits possess a Fifth Amendment property interest, neither of which is mentioned in the Jurisdictional Statement, ruled in the affirmative. In *Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980), the Ninth Circuit held that student veterans receiving V.A. educational benefits have "a statutory entitlement to receipt of an educational assistance allowance [that constitutes] a 'property right' protected by the Due Process Clause" (citations omitted). Similarly, in *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975), the court held that "plaintiffs' interest in receiving continued [V.A. pension] benefits under laws administered by the Veterans Administration is an interest in 'property' within the meaning of the Due Process Clause." *Id.* at 1308 (citations omitted). Significantly, many courts have held that even applicants have a property interest in disability compensation or other statutory benefits. (*See* cases cited in App. A at 16a-17a).

Third, *Gendron* was disposed of summarily at the pleading stage, depriving the plaintiff of any opportunity to initiate discovery. No discovery was taken, and the court acted on a brief set of stipulated facts. (App. G). Consequently, none of the questions raised herein was adequately presented in the record in *Gendron*.

Fourth, appellees have demonstrated the stark inadequacy of representation by service representatives. (App. A at 21a-27a). As noted above, appellees sought aid from service representatives, found their services wanting, and submitted extensive evidence of the inadequacy of service representation, including a series of random samples of claims and briefs prepared by and hearings conducted by service representatives. Gendron did not even seek assistance from a service representative, and none of the stipulated facts related to the adequacy of service representatives. (App. G). Although Gendron belatedly attempted to raise the issue of the adequacy of representation by service organizations, his request at the close of oral argument to the three-judge court for permission to submit evidence on the adequacy of representation was ruled untimely because it was neither alleged in the complaint nor addressed in the stipulated facts. (App. F). Appellants suggest, incorrectly, that this issue was presented and decided on the merits. (Jur. St. at 13-14, n.9). In contrast, the ineffectual nature of lay service "representation" is uncontroverted in the record below.

Demarest v. United States, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2150 (1984), like *Gendron*, involved an applicant's facial challenge to the constitutionality of the fee limitation. In contrast to the complex radiation claims of appellees, Demarest's claim, which he described as "relatively routine," involved simple toe and neck injuries. (Stay Appl. App. F at 6). Furthermore, Demarest neither sought assistance from nor challenged the adequacy of the representation provided by service organizations. Finally, Demarest took no discovery in the district court, and made no attempt to show the negative effects of the fee limitation upon the adjudication of SCDD claims.

b. Barely discernible in the Jurisdictional Statement is the fact that the preliminary injunction also was based upon independent First Amendment grounds. (Jur. St. at

24-25). Appellants claim neither that the factual findings upon which the district court based its First Amendment ruling are erroneous nor that the district court's analysis is flawed. (App. A at 40a-48a). Appellants merely state their belief that the First Amendment issue is not "separate and independent" from the due process question. (Jur. St. at 24). Because appellants skirt the First Amendment issue, appellees simply direct the Court to the district court's extensive analysis of appellees' First Amendment claims. (*See* App. A at 40a-48a). The district court properly determined that: (1) the First Amendment rights to petition, association, and speech protect efforts by organizations to obtain effective legal representation for their members or constituents and the right of individuals to retain attorneys at their own expense; (2) the fee limitation deprives appellees of meaningful access to the V.A. adjudicatory system, the sole avenue by which they may obtain redress for their service-connected deaths and disabilities; and (3) appellants raised no government interest in preserving the fee limitation, but merely sought to assert paternalistic arguments on behalf of veterans.

No prior decision concerning the $10.00 fee limitation addresses the First Amendment claims advanced by appellees. Yet, appellants contend that *Staub v. Roudebush*, 424 F. Supp. 1346 (D.C.C. 1976) (*"Staub II"*) (*on remand* from *Staub v. Johnson*, 519 F.2d 298 (D.C. Cir. 1975) (*"Staub I"*) (holding substantial federal question presented)), *vacated and remanded without opinion*, 574 F.2d 637 (D.C. Cir. 1978) (*"Staub III"*), "rejected an indistinguishable First Amendment challenge to Section 3404(c)." (Jur. St. at 25 n.18). This contention is erroneous. First, the district court's decision in *Staub II* was vacated without opinion in *Staub III* and has no precedential value. Second, the First Amendment claim in *Staub II* was limited to the right of freedom of association. Third, *Staub II* did not address the First Amendment rights of organizations to provide

legal services to their members or constituents with respect to Staub's claim. *Staub I* remains the only Circuit Court of Appeals First Amendment decision on the fee limitation, and it clearly supports the substantiality of appellees' freedom of association claim. 519 F.2d at 302.

c. The Jurisdictional Statement principally focuses on a selected rendition of legislative events concerning various pieces of omnibus legislation to allow judicial review of SCDD decisions, revise the fee limitation, and effectuate other changes in veterans' legislation. (Jur. St. at 14-24). While the conceptual and legal bases of their arguments are unclear, appellants appear to be raising two separate contentions. First, appellants suggest that Congress has made "findings of fact" concerning the fee limitation, to which this Court should defer. (*Id.* at 19). Second, appellants urge the Court to draw the inference that the fee limitation is fair because Congress has never repealed it. (*Id.*)

When Congress passes a law it may make findings of fact and set them forth in the statute or its preamble. For example, in passing the National Labor Relations Act, 29 U.S.C. Sections 151-69 (originally Pub. L. 198, 49 Stat. 449 (1935)), Congress made specific findings that were embodied in the statute. Appellants, however, fail to identify what findings of fact they contend Congress made in enacting the fee limitation. In fact, Congress made no findings of fact when it enacted the most recent version or earlier versions of the fee limitation. *See* Pub. L. 85-855, 72 Stat. 1105 (1958); Pub. L. 85-56, 71 Stat. 83 (1957); (*see also* App. E). Thus, there are no legislative findings of fact to which the district court should have or could have deferred. Indeed, appellants did not even raise this argument below.

Appellants fix upon a single report of the twelve-member Senate Committee on Veterans Affairs, S. Rep. 97-466, 97th Cong., 2d Sess. (1982) (the "CVA Report"), implying that it contains legislative findings of fact. (Jur. St. at 3, 8,

16-17). Significantly, the CVA Report was submitted in connection with the Committee's 12-0 vote to favorably report a bill that would have changed the fee limitation. The House version of the bill was never reported out of committee. Thus, the CVA Report was not passed by the entire Senate or by the House and does not constitute legislative findings of fact. *Compare Rostker v. Goldberg*, 453 U.S. 57, 73-74 (1981) (both houses of Congress adopted the findings of the Senate Armed Services Committee by passing their report). Rather, it represents only the views of twelve Senators, all of whom thought that the $10.00 fee limitation should be eliminated.

Moreover, the Jurisdictional Statement recites the following misleading quote from the CVA Report: "there has developed 'a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants.'" (Jur. St. at 8). This statement is drawn from the following passage in which the Committee criticizes the current fee limitation:

> The basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA, was grounded in a belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance. Whatever the merits of such a view at the time that the limitation was imposed . . . it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.
>
> The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters. As noted above, there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants. The Committee fully expects and believes that this system will continue and prosper, undiminished by the new right of judicial review and opportunity for attorney participation created in this legislation. However, an individual should not be arbitrarily restricted in retaining an attorney . . . .

S. Rep. 97-466, 97th Cong., 2d Sess. 50-51 (1982). Thus, the Congressional report to which appellants point concludes that the fee limitation constitutes an arbitrary and undue restriction on the right to counsel. That this is the only report which appellants quote to support their argument that Congress has made legislative "findings of fact" is telling. Congress has never made the legislative findings of fact attributed to it by appellants.

Moreover, even if Congress had made findings of fact, the deference standard enunciated by appellants is inapplicable here. The "deference" authorities cited by appellants involve either application of the "rational basis" test, which is not the appropriate standard in a procedural due process or First Amendment case, or instances in which Congress has set forth specific findings of fact in the text of the challenged statute.[4]

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[4]For example, *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984), involved a claim that a federal statute requiring disclosure of information in order to register pesticides was an unconstitutional taking of property. The applicable test was whether the conditions under which the data were submitted were "rationally related to a legitimate government interest." *Id.* at 2876, 2880 n.18. Both *Vance v. Bradley*, 440 U.S. 93, 94-97 (1979) and *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 594 (1939), were equal protection challenges, and, like *Monsanto*, involved application of the rational basis test. In *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Wild Free-Roaming Horses and Burros Act contained specific findings in the text of the challenged statute.

Appellants' second argument, that the Court ought to infer that the fee limitation is fair from Congress's failure to amend the fee limitation, is even less persuasive. First, no inferences can properly be drawn from a negative vote on proposed legislation. For example, legislators may have felt the proposed legislation did not go far enough, as suggested by the bill mentioned by appellants which would have preserved the $10.00 fee limitation intact through decision by the BVA. (Jur. St. at 17 n.11). Second, the $10.00 fee limitation has never been separately considered by Congress, but has always been considered as part of omnibus legislation to revamp the entire V.A. adjudicative system. Appellants are in no position to speculate as to the reasons why Congress has failed to rectify the deprivation of constitutional rights caused by the fee limitation. Moreover, that Congress has failed in its responsibility furnishes no basis for urging this Court to do so.

CONCLUSION

For all the foregoing reasons, the Court should summarily affirm the preliminary injunction issued by the district court.

Dated: November 13, 1984

ROBERT D. RAVEN
KATHLEEN V. FISHER
GORDON P. ERSPAMER*
MICHAEL F. RAM
MORRISON & FOERSTER

By: GORDON P. ERSPAMER

Attorneys for Appellees

**Counsel of Record*

(Appendices follow)

Appendix E

HISTORY OF THE AGENT AND ATTORNEY FEE LIMITATION WITH RESPECT TO VETERANS' BENEFIT CLAIMS

The first legislation to limit the fees of agents or attorneys who assisted a claimant for military service-related benefits, an Act to Grant Pensions, was passed on July 14, 1862. (12 Stat. 568). Congress authorized a fee of $5.00 for attorneys assisting in the prosecution of pension or bounty claims. This statute expressly stated that the fee limit pertained to the *execution of applicant declarations, affidavits and requisite correspondence*, and it provided for payment of an additional $1.50 per affidavit in cases where the Commissioner of Pensions required additional testimony. In 1864, this act was amended, raising the authorized fee to $10.00 and making its payment contingent upon successful prosecution of the pension claim; however, the new statute again makes it clear that the services for which the attorney was to be remunerated consisted simply of filling out the necessary forms. (13 Stat. 397).

During the next half century, no fewer than 11 new statutes were enacted in which flat fee limitations were imposed on attorneys or agents who assisted claimants in filing applications for pensions. (*See* Attachment 1). In each of these instances, all of which concerned applications for pensions or bounties, the role of the attorney or agent considered by the legislators was that of filling out the necessary papers in an original claim.

In 1917, however, when Congress amended a 1914 act establishing the War Risk Insurance Program (38 Stat. 711), an implicit distinction was drawn between the clerical function of completing forms and more complex tasks performed by attorneys. Thus payment of attorneys' fees equal to 10% of the amount recovered was authorized by the amended act only for litigated cases, while fees were pro-

hibited for assistance in filing original claims. (40 Stat. 102). Additional amendments introduced in 1917 instituted death and disability compensation for commanding officers, enlisted men, and Army and Navy nurses. Again, payment of 10% of amounts awarded in litigated cases was authorized, but no fees were permitted for agents and attorneys assisting with filing original claims. (40 Stat. 405).

This act was amended in 1918, and additional attorneys' fees of $3.00 were authorized for "such assistance as may be required in the preparation and execution of the necessary papers" in filing original claims. The percentum fee in "the event of disagreement as to a claim under the contract of insurance between the Bureau and any beneficiary or beneficiaries thereunder" was again authorized, but was reduced to 5%. (40 Stat. 555).

Enactment of the War Risk Insurance Program raised the fear that overreaching attorneys tempted by the 10% fee allowance would exploit veterans. In his letter of March 18, 1918, to Congressman Sims, Secretary of the Treasury W. G. McAdoo expressed his concern thus:

> Unscrupulous attorneys and claim agents are circularizing prospective claimants with literature in which they seek to neutralize the warnings of the department by assertions that their employment will facilitate the prompt allowance of the claims.

H.R. Rep. No. 471, 65th Cong., 2d Sess. (1918).

The fear that unprincipled attorneys would exploit the beneficiaries of veterans' benefit was shared by Congressman Treadway. Referring to the loss of the *Tuscania* during the House debates on April 17, 1918, he said:

> These [attorneys] have been so solicitous with their business that they have even gone to the extent of notifying the next of kin of an entire shipload being lost, when half or more of them were saved. The Adjutant

> General's office informed me that it had referred three telegrams of that nature to the Department of Justice in order to prosecute these claim agents for misrepresentation and the injury to the feelings of relatives that naturally would result.

56 Cong. Record 5222, col. 1 (April 17, 1918).

Although considerable reliance was apparently placed upon such reports, at no point in this debate was it suggested that the appropriate remedy might consist of prosecuting or disciplining individuals who had made such misrepresentations, instead of imposing a flat fee limitation.

In any case, however, there were dissenting voices. Congressman Dewalt, for example, in the course of the same debate, addressed his remarks to the concern that the veteran be afforded a genuine opportunity for redress in settling disputes. Considering the situation where the Veterans Bureau had turned down a veteran's insurance claim, he said:

> The party disagrees with the Bureau and says, "I am entitled to full compensation." He has lost both legs, or an eye and one leg, and therefore he claims full compensation . . . . The government says, "You are not entitled to it." Necessarily there must be litigation. The gentleman from Iowa [Mr. Green] says, "Refer it to the Bureau itself." Refer it to the party who is interested for the government? I say, "No." I say let the matter be determined by a jury of the claimant's peers. Let it be determined in the situs of the claim by people who are entirely unprejudiced in the matter, and let a jury of his peers determine as to whether or not a claimant has a just claim . . . .
>
> Mr. Green: Does the gentleman mean to say that the Government officials are a prejudiced party?
>
> Mr. Dewalt: I admit this, and I am very loathe to say it, that the Government Officials as a rule, not

only in pension cases, but in other cases, hew very strictly to the line and adhere precisely to what they know the law to be, and there are equitable cases that possibly would be better determined by a jury of 12 than by any other tribunal that could be established.

Mr. Madden: If the department had already decided the case against the claimant, it would be likely to make an adverse decision, would it not?

Mr. Dewalt: Certainly. They would be prejudiced. The man convinced against his will remains of the same opinion.

56 Cong. Record 5225, col. 2 (April 17, 1918).

It is clear from the debate that those congressman who were opposed to judicial review and the awarding of attorneys' fees assumed, as then may have been the case, that claims cases before the Veterans Bureau were non-adversarial in nature. Congressman Green insisted, "The government ought not to take the position that is often taken by insurance companies, and try to defeat every claim that is possible regardless of its merit; but, on the contrary, pay every one that is meritorious, and pay every cent to which the claimant is entitled."

Equally clearly, there were others in the House at this time who felt that this assumption was a tenuous one. Congressman Juul made the following plea:

> I am afraid that the $3.00 limitation and a provision in the penalty clause of the bill is going to work harm. I know of cases where three consecutive sets of papers in a single case are and have been missing for claims arising since the war, where allotments have not been made .... If a claimant today in any state in the union goes out and tells an attorney that he is limited to $3.00, that he has waited three or six months to get action on his claim, he is going to get no legal service

> that can be of any value to him .... The aim of this bill is to help the claimant and not to hurt him, and I think the penalty clause as it now stands is such that no reputable attorney anywhere in the country, unless for purely patriotic purpose, will help the claimant to get his money.

56 Cong. Record 5225, col. 1 (April 17, 1918).

Also in the course of this debate, it was again made clear that the flat fee limitation imposed by Congress was intended to apply only to the performance of clerical tasks in preparing a pension claim, as distinct from the gamut of more complex tasks required in litigation:

> Mr. Snook: Now, this bill is so drawn ... that these attorneys cannot collect a fee for services in any one of these cases, except under regulations to be formulated and promulgated by the Bureau of War-Risk Insurance. It was suggested to the committee, however, that it might be necessary, and probably was necessary, that some compensation should be allowed to someone for preparing the papers for applicants, and so the fee for that purpose was fixed in the bill at $3.00 ....
>
> Mr. Linthicum: The gentleman says "preparing papers"; that is merely filling up a blank.
>
> Mr. Snook: *That is merely filling up a blank.*

56 Cong. Record 5223, cols. 1 & 2 (April 17, 1918) (emphasis added).

Congressman Treadway reiterated this point and went on explicitly to acknowledge the assumption that, apart from litigated insurance cases, there was no need for attorney services beyond that of simply filling out forms:

> Mr. Treadway: May I call the gentleman's attention to the fact that there are two places where attorneys or claims agents are recognized? One is in the prepara-

tion of the papers and the execution of necessary papers, where not to exceed $3.00 may be charged. *That is simply a clerical service.* Then, you will see the bill also recognizes attorneys in connection with the suit.

Mr. Juul: Yes.

Mr. Treadway: There is no other place where the claim agent can legally perform services, and it is not intended that there should be.

56 Cong. Record 5223, col. 1 (April 17, 1918) (emphasis added).

The act which was passed following this debate (40 Stat. 555) reduced the percentum allowance in litigated insurance cases from 10% to 5% of the amount awarded, and authorized a fee of $3.00 for assisting and preparing necessary claim papers.

During the next few years, several new statutes appeared which were again concerned exclusively with pension cases: in 1918, attorneys' fees of $10.00 were allowed for assistance in processing claims for pensions granted to widows and minor children of veterans who served in the war with Spain, the Philippine Insurrection, or in China (40 Stat. 903); in 1920, this act was amended by raising the attorney fee to a maximum of $20.00 (41 Stat. 982); in 1922, another amendment extended the classes of eligible individuals and again reduced the attorney fee limit to $10.00 (42 Stat. 834). An act authorizing "adjusted service pay" in 1924 specified payment of additional compensation to veterans of the first World War, setting maximum allowances at different rates depending on rank, type and location of service, and prohibiting payment of attorneys' fees. (43 Stat. 121).

Later, in 1924, a more comprehensive statute, which included medical, surgical, hospital, and convalescent care, insurance, vocational training, medical examination and rating, and death and disability compensation, authorized

a $10.00 fee for assistance in preparation of a claim, and 5% of the amount recovered in litigated insurance cases. (43 Stat. 607). An amendment to this act in 1925 again increased the amount of attorneys' fees authorized in litigated insurance cases from 5% to 10% of the amount recovered. (43 Stat. 1302).

During the next five years, another series of acts limiting attorneys' fees pertaining to a variety of specific groups eligible for pension benefits was passed by Congress. (*See* Attachment 1).

The next broad-reaching piece of legislation, the Consolidation Act of 1930, established the Veterans Administration through a merger of the Pension Bureau, United Veterans Bureau and the National Conference for Disabled Volunteer Soldiers. (46 Stat. 1016). No change was made at that time with respect to provisions prescribing agent or attorney fee limitations.

In 1936, a new law authorized recognition of representatives of designated veterans' organizations and prohibited the payment of any fee for their assistance in prosecuting claims; in addition, it authorized the Veterans Administration to recognize other agents and attorneys, and in this case fixed a $10.00 fee limitation for preparation of claims brought under statutes administered by the V.A. The distinction first drawn in 1917 was preserved in this act, however, as courts were still authorized to award "reasonable attorneys' fees" not to exceed 10 percent of the amount awarded in litigated insurance cases. (49 Stat. 2031).

A further consolidation of laws administered by the Veterans Administration was effected in 1957 (71 Stat. 83), and these were recodified in 1958 (72 Stat. 1106), placing the $10.00 attorney fee limitation in 38 U.S.C. § 3404 and the percentum allowance for actions in a court of law in 38 U.S.C. 701 *et seq.*, where they remain today.

Attachment

(a) In 1866, an act authorizing "Bounties to Colored Soldiers and the Pensions, Bounties and Allowances to Their Heirs" set a fee limitation range of from $5.00 to $10.00, depending upon the amount of the claim collected. (14 Stat. 367).

(b) A fee limit of up to $25.00, subject to approval by the Commissioner of Pensions, was authorized for claims for pension or bounty land in 1870. (16 Stat. 193).

(c) The fee limit in pension cases was again limited to $10.00 in 1878. (20 Stat. 243).

(e) In 1890, a $10.00 attorney fee was authorized for preparation of claims for pensions granted to incapacitated soldiers and sailors. (26 Stat. 182).

(f) In 1892, an act granting pensions to Army nurses prohibited payment of attorneys' fees. (27 Stat. 348). Similarly, fees were prohibited in acts granting pensions to remarried widows (31 Stat. 1445) in 1901, and to veterans of the Civil War and the War with Mexico in 1907. (34 Stat. 879).

(g) In 1912 and 1916, acts extending certain pension benefits authorized attorneys' fees of $10.00 in the preparation of initial claims. (37 Stat. 112 and 39 Stat. 844).

(h) In 1926 an act granting pensions to veterans (and their widows) of the Civil and Mexican Wars, widows of the War of 1812 and to Army nurses, again authorized attorneys' fees of $10.00 for assistance in filing original claims. (44 Stat. 806).

(i) In an act amending the World War Adjustment Compensation Act, also in 1926, payment of any attorney fee was again prohibited. (44 Stat. 826).

(j) Attorneys' fees of $10.00 were again authorized in a 1927 act extending pension benefits to veterans of the Indian Wars for 1817 to 1898. (44 Stat. 1361).

(k) In 1928, attorneys' fees were again prohibited in an act granting pensions to widows and former widows of Civil War veterans. (45 Stat. 714).

(l) In 1930, an act increasing pensions to veterans and nurses of the War with Spain, the Philippine Insurrection and the Chinese Relief Expedition again authorized attorneys' fees of $10.00 for the preparation of original claims. (46 Stat. 492).

Appendix F

In the United States District Court
Central District of California

Honorable M. Oliver Koelsch, Honorable E. Avery Crary,
Honorable Malcolm M. Lucas, Judges Presiding

No. 73-2241-EC

Ronald Gendron
Plaintiff,

v.

Honorable William B. Saxbe,
Attorney General of the United States, et al.,
Defendants.

Reporter's Transcript of Proceedings
Place: Los Angeles, California
Date: Monday, November 25, 1974

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(p. 26) Mr. DeVermont: Oh, we have one offer of proof, your Honor, if you would like it. That would be an offer of proof on the adequacy of lay representation, if your Honors feel it is necessary.

Judge Crary: Offer of proof as to the adequacy?

Mr. DeVermont: Yes, your Honor.

Mr. Tepper: We have a live witness, Mr. Patrick J. Wood, who is the Director of the Los Angeles County Funded Veterans Average Program, who is here today, and we would propose to make an offer of proof to submit an affidavit or to present live testimony, whichever your

Honors prefer, if any of those are agreeable to your Honors, if your Honors believe any are pertinent.

We have heard that your Honors have stated that lay representation might be an issue and its availability might be an issue. If that's the case, the adequacy of lay representation should also be an issue.

Judge Crary: Do you have an affidavit?

Mr. Tepper: We did, your Honor, and we've already submitted a copy to the Government.

Judge Crary: What's the Government's position?

Ms. Reynolds: Your Honor, basically, the affidavit is from a lay person who says it's his opinion that lay representation is not sufficient. I would submit that certainly the weight of the affidavit—

Mr. Tepper: Actually a second-year law student, your Honors. It is true he's not an attorney.

Judge Crary: The feeling is we should not take any testimony as to the facts, so we'll not take any testimony or any affidavit on the matter.

Mr. Tepper: Your Honor, might I be heard further for one moment, to clarify something?

Judge Crary: All right. Your time is long up, but go ahead.

Mr. Tepper: Yes, I know, your Honor. I apologize for that—we apologize for that.

When we were contacted by your law clerk, he asked us if we and the Government would be willing to enter into stipulations as to facts, but there was never any indication at that time nor was there any indication or stipulation of facts that those were all the facts involved and that other facts might not either be relevant at that time or might crowd up or become relevant. Therefore, I submit if your

Honors are concerned with the availability of lay counsel, the adequacy of lay counsel is just as important an issue.

Judge Crary: We're not going to open that up now. If that had been an issue and insisted that you wanted to be heard on, why, we would have decided it. But we're not going to open it now, with you being in the position of having a lay witness which you know is going to testify it's not sufficient and the Government not being in a position to counteract it. It wouldn't be a fair procedure. So that's the ruling, that you not be allowed to offer any evidence on it.

Mr. Tepper: Thank you, your Honor. That concludes our case, your Honor.

Appendix G

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United States District Court
Central District of California

CV 73-2241-EC

Ronald Gendron
Plaintiff,

v.

Honorable William B. Saxbe,
Attorney General of the United States; et al.,
Defendants.

STIPULATION OF FACTS FOR TRIAL

The Parties hereto, by and through their respective undersigned counsel, hereby Stipulate to the following facts, for the purposes of trial in this action:

1. That Plaintiff Ronald Gendron [hereinafter referred to as "Gendron"] is a male citizen of the United States and a resident of Los Angeles County, and was born on August 24, 1948;

2. That Gendron enlisted in the United States Air Force on or about February 6, 1969, and prior to his enlistment took and passed a required pre-enlistment physical examination;

3. That as the result of a psychiatric evaluation conducted at the USAF Hospital, Chanute AFB, Illinois on or about May 14, 1969, at which time Gendron was found to be suffering from psychiatric problems, Gendron was discharged from the United States Air Force as "unsuitable," on or about June 20, 1969;

4. That Gendron's discharge aforesaid was under Honorable conditions;

5. That on or about July 8, 1972, Gendron presented a claim to the Veterans Administration [hereinafter referred to as the "VA"] for disability benefits as a veteran;

6. That the VA gave Gendron an examination on or about January 29, 1973 and after consideration of Gendron's application by a ratings board determined, on or about March 2, 1973 that Gendron was not entitled to veterans disability benefits;

7. That Gendron appealed the VA's adverse determination on or about May 3, 1973;

8. That Gendron thereafter attempted to retain an attorney to represent him in his appeal to the VA aforesaid, but was unable to retain an attorney by reason of the $10

fee limitation of 38 U.S.C. § 3404, according to the six (6) attorneys whom Gendron had contacted;

9. That Gendron is not eligible for the services of a legal aid attorney by reason of the fact that he was not financially qualified therefor, since Gendron then had, and currently has, money in a savings account obtained in a personal injury settlement in excess of the amount of money an individual is permitted to have who is eligible for legal aid assistance;

10. That Gendron did not apply to the American Legion or the Veterans of Foreign Wars [hereinafter referred to as the "VFW"], or any other patriotic or veterans or service organization for assistance with his appeal before the VA;

11. That the reason Gendron did not apply to the said patriotic / veterans / service organization, including the American Legion and the VFW was because Gendron was informed that said organizations do not supply assistance from attorneys, but only from lay persons;

12. That, in fact, the American Legion, the VFW, and other patriotic/veterans/service organizations, do offer assistance to needy veterans in matters of this kind, but the individuals representing veterans at VA hearings are lay persons and not attorneys;

13. That Gendron has received the following aid, from the following agencies, at the following times, after findings by the agencies, under their own separate and applicable regulations and definitions of "total disability" or "unemployability," that Gendron was totally disabled and/or unemployable by reason of his mental condition;

(a) Aid to the Totally Disabled (ATD) from the State of California, monthly checks from October 14, 1970 to March 3, 1973;

(b) Social Security Disability (SSD) from the Social Security Administration, monthly checks from March 1, 1973 to November 2, 1974 (said date being of the last check received by Gendron);

(c) Aid to the Totally Disabled (SSI) (California's contribution to the Supplemental Security income fund administered by the Social Security Administration), monthly checks from March or April 1973 to November 2, 1974 (said date being of the last check received by Gendron);

14. That since March, 1973, Gendron has been and remains under the weekly care of psychiatrist whose services are paid by the federal "Medicare" program.

15. It is further stipulated that the documents set forth in Plaintiff's Exhibits "A", "B", "C", "E", "F", "G", "H", "I", "J", "K" & "L", and the documents set forth in Defendant's Exhibits are authentic, and are true and accurate copies of the original documents which they purport to represent.

WHEREFORE, upon said Stipulations of the above facts, they are deemed to be admitted and need not be proved.

Dated: November 15, 1974.

SCOTT J. TEPPER
CAROLE E. GOLDBERG
DENNIS H. DEVERMONT
A.L. WIRIN
FRED OKYAND

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